88-1985

No.:_____

SUPREME COURT, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

MARGARET HUDSON,

Petitioner,

-against-

NATIONAL RAILROAD
PASSENGER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether in this FELA action based on the respondent's negligence in allowing petitioner to be subjected to repeated sexual harassment by a higher ranking fellow employee, over a more than six months period, resulting in petitioner's suffering severe permanent mental and emotional injury, it was error depriving petitioner of a fair trial of her claim for the district court to repeatedly suggest in its jury charge that petitioner was abnormal or peculiar by reason of her having reacted to such prolonged harassment as she did.

2. Whether it was error for the court to instruct the jury that the measure of care owed to petitioner by the respondent, which had an explicit

policy forbidding sexual harassment, but which was shown to have taken no meaningful steps to prevent the continued harassment of petitioner, despite clear and repeated notice of how offended and threatened she felt by this conduct, was only such as would suffice to protect an idealized "normal" or "perfectly normal" person.

3. Whether it was error for the trial court to refuse to instruct the jury on causation in accordance with this Court's decision in Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE

The Proof at Trial 3

The Charge Conferences and Charge 20

The Jury's Note and Verdict 24

The Memorandum of Affirmance 24

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY TO PROVIDE CRITICALLY NEEDED GUIDANCE CONCERNING HOW JURIES SHOULD BE INSTRUCTED ON THE ISSUE OF NEGLIGENCE IN BUELL-TYPE ACTIONS, INCLUDING ACTIONS BASED ON SEXUAL HARASSMENT . . 28

2. THIS CASE ALSO PRESENTS THE OPPORTUNITY FOR THIS COURT TO REAFFIRM THE NEED

Page

FOR PROPER INSTRUCTIONS ON CAUSATION IN FELA CASES 43

CONCLUSION 51

APPENDIX

Summary Order of Affirmance of the United States Court of Appeals for the Second Circuit, February 6, 1989 . . . 1a

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing, March 13, 1989 . . . 4a

Memorandum and Order of the United States District Court for the Southern District of New York Denying Motion for New Trial, July 5, 1988 . . . . . 6a

TABLE OF AUTHORITIES

Cases:

Adkins v. Seaboard System R.R., 832 F.2d 340 (6th Cir.), cert. denied, 108 S.Ct. 452 (1987) . . . 30

Amendola v. Kansas City Southern Ry Co., 699 F.Supp. 1401 (W.D. Mo. 1988) 31

Page

Atchison, Topeka & Santa Fe R. Co. v. Buell, 480 U.S. 557 (1987) . . . 28, passim

Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928). . 35

Bentley v. Stromberg-Carlson Corp., 638 F.2d 9 (2d Cir. 1981). . 33

Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), reversed, 312 U.S. 492 (1941) 34

Matter of Crookston v. Brown, 140 A.D.2d 868, 528 N.Y.S.2d 908 (3rd Dept. 1988) 32

Eaton v. Long Island R. Co., 398 F.2d 738 (2d Cir. 1968) 35

Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) 48

Gerkin v. Brown & Schler Co., 177 Mich. 45, 143 N.W. 48 (1913) . . . 35

Halko v. New Jersey Transit Rail Operations, Inc., 677 F.Supp. 135 (S.D.N.Y. 1987) 30

Hammond v. Terminal R.R. Ass'n of St. Louis, 848 F.2d 95 (7th Cir. 1988), cert. denied, 57 U.S.L.W. 3552 (February 21, 1989) 30

Page

Lancaster v. Norfolk & Western R. Co., 773 F.2d 807 (7th Cir. 1985), cert. denied, 480 U.S. 945 (1987) 30

McGlothan v. Pennsylvania R. Co., 170 F.2d 121 (3rd Cir. 1948) . . . 33

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 31, 45, 51

Norfolk & Western R. Co. v. Lancaster, 480 U.S. 945 (1987) . . 29

Pierce v. Southern Pac. Transp. Co., 823 F.2d 1366 (9th Cir. 1987) 30

Price Waterhouse v. Hopkins, U.S. , 57 U.S.L.W. 4469 (May 1, 1989) 44

Quercia v. United States, 289 U.S. 466 (1933) 33

Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957) . . . . . .ii, 23, 43 passim

Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970) . . . 32, 39

Webb v. Illinois Central R. Co., 352 U.S. 512 (1957) 48

Page

Statutes:

45 United States Code §51 . . . . . 3, passim

Other Authorities:

American Psychiatric Association "Statement on Discrimination Based on Gender or Sexual Orientation," Am. J. of Psychiatry, November 1988, p. 1494 31

3 Devitt, Blackmar & Wolfe, Federal Jury Practice and Instructions (4th ed. 1987) 34

3 Harper, James & Gray, The Law of Torts (2d ed. 1986) . . .34, 35

4 Harper, James & Gray, The Law of Torts (2d ed. 1986) 43

Prosser & Keeton, The Law of Torts (5th ed. 1984) . . . . . 34, passim

Sand, Siffert, Reiss, Sexton & Thrope, Modern Federal Jury Instructions 43

R. Sandroff, "Sexual Harassment in the Fortune 500," Working Woman, December 1988, p. 69 31

NO. _____

IN THE
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October Term 1988

MARGARET HUDSON,

Petitioner,

-v-

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Margaret Hudson respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in this action on February 6, 1989.

OPINIONS BELOW

The summary memorandum of affirmance of the United States Court of Appeals for the Second Circuit, which will not be officially reported, appears in the Appendix to this petition. The unreported memorandum and order of the United States District Court of the Southern District of New York, dated July 5, 1988, denying petitioner's motion for a new trial appears in the Appendix to this petition.

JURISDICTION

By order dated March 13, 1989, the United States Court of Appeals for the Second Circuit denied petitioner's timely motion for rehearing. A copy of that order appears in the Appendix to this petition. This

petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

45 United States Code §51:

> Every common carrier by railroad while engaging in commerce...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce...for such injury...resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier....

STATEMENT OF THE CASE

The Proof at Trial

At the trial of this action, petitioner adduced evidence of her having been repeatedly subjected, while she was employed in a low level cler-

ical position with the respondent (hereinafter "Amtrak"), to sexual harassment by a fellow employee, Edward Kortright, a low level supervisor whose office was located in the same part of New York's Penn Station to which petitioner had been newly assigned beginning on March 1, 1984. This harassment included an incident where Kortright came into her work area and engaged her in conversation while he sat on the edge of a credenza with his legs spread apart in an exaggerated fashion (T62-63).[1] This

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[1]Numbers in parentheses preceded by "T" refer to the transcript of trial, which is a complete transcript except for the testimony of petitioner's medical witness, which was only subsequently transcribed. References to the testimony of these witnesses are preceded by the witness's name. "JA" refers to the Joint Appendix in the Court of Appeals.

was shortly followed by an incident where he interrogated her concerning such personal matters as "How did your boyfriend treat you? Did he treat you good?" while at the same time touching her (T67-69), and by another incident where, after she had protested that she would take up with her boss Kortright's announcement that her "boyfriend," later her husband, who was also an Amtrak employee, could no longer visit her in her work area, Kortright, again touching her, stated, "Wait a minute. I don't want you to get in trouble. You're new here. You can lose your job. We're friends." (T70-70).

In mid-March, following these incidents, higher level Amtrak management and supervisory personnel were made aware of Kortright's harassment of

petitioner. At that time, supervisor Dee Thompson, to whom petitioner had earlier complained that she felt "trapped" by Kortright's harassment and was afraid of him (T73-76), was directed by her superior, Barry Sullivan, to emphatically instruct Kortright to cease and desist bothering petitioner (T363-64). However, Thompson, who had neglected to inform Sullivan of a similar sexual harassment complaint made against Kortright by another employee a month earlier (T397, 401-02, 302-04), did not do as Sullivan had instructed. Instead, notwithstanding Thompson had twice assured petitioner that she would "nip this in the bud" (T75, 77), all she did was to call Kortright into her office, inform him that petitioner had charged him with sexual harassment,

and, in virtually the same breath, tell him "not to worry" and to "continue to do your job" (T512). Sullivan did not follow up on this matter in any way (T364).

Following Thompson's conversation with Kortright, for over a month he ceased harassing petitioner. However, in late April or early May the harassment resumed, with Kortright's coming up from behind petitioner while she was at a copying machine, putting his arm around her and his chin on her shoulder, and asking her "What are you doing?" (T79; see also T323-24). A week later he again approached her in the copying room, but on this occasion he left when she looked up and saw him (T80-81). According to petitioner, she immediately complained of each of these

incidents to her supervisor, Frank Summa, who she claimed assured her that he would speak to either Thompson or Sullivan (T80, 82, 87).[2] These incidents were followed by a number of incidents where Kortright would come out of his office and stop short in front of petitioner and others where he would sit on a desk in the hallway, with his legs dangling, blocking her passage

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[2]Summa denied ever having discussed with petitioner her problems with Kortright, other than when she told him, after the fact, that she had filed a formal complaint against Kortright (T572-77). He did admit, though, to having discussed with Thompson in mid-March the "problem" of petitioner's then fiance coming into petitioner's work area (T572). Summa's claim of ignorance concerning petitioner's problem with Kortright was in significant respects contradicted by the testimony of his other secretary and by petitioner's union representative, both of whom testified that they discussed this matter with Summa (T505, 292-93).

(T83-84). In addition, in July there were two incidents, both on the same day, where he tried to bump into her (T83-86). Also, on August 13, as petitioner was passing him in the hallway, Kortright, who had been leaning against the wall, stepped into her, pushing his hip against her's (T90-91; see also T326-27).

Following the August 13th incident, petitioner attempted to file with Amtrak's Affirmative Action Office a formal written complaint charging Kortright with harassment. However, Stan Eastman, the employee assigned to receive such complaints, initially refused to give her the complaint form. Nonetheless, after petitioner complained to Eastman's supervisor, she was given the complaint form, which she

completed and returned on August 20 (T96-103; JA125-27). At that time, Eastman told her that he did not know how long it would take to act on her complaint (T107-08)--which was consistent with Mr. Sullivan's admission that Amtrak's personnel department generally took a long time to act on formal complaints of sexual harassment (T403).

Despite petitioner's various complaints, on August 21, the day after she filed her formal complaint, Kortright again harassed her by sitting on the hallway desk with his legs dangling and forcing her to brush against him as she attempted to get by--with Kortright stating loudly, "Well, excuse me," and then laughing (T108-09). This was followed a few days later by an incident where, after she had reported to the

maintenance department a flooding condition in her office, her husband, who was a supervisor in that department, informed her that, when he and a plumber had attempted to enter her work area, they were told by one of Kortright's subordinates that they could not enter this area without Kortright's permission--whereupon they simply left (T110-11).

Upon hearing of the latter incident, petitioner, who in March had complained to Thompson of feeling "trapped" by Kortright (T73-76), again had a feeling of being trapped and began to suffer severe stomach pains, similar to pains she had been experiencing in recent weeks along with episodes of vomiting (T109-12). Later that day, petitioner saw her doctor, who pre-

scribed medication for her, and thereafter she returned to work (T115-16, 119-21). However, still Kortright continued to harass her, glaring at her and occasionally trying to bump into her; he "would glare at [her] with leering, looking up and down" (T121-23).

On September 6 petitioner called Eastman to check on the status of her complaint, but was informed that he had done nothing because he did not know what to do. At this time she told Eastman of the flooding incident and that she was under a doctor's care (T122). On September 11, she again called Eastman, who on this occasion was annoyed with her and told her that "[t]hese things take time" and it was "none of [her]business" how they were progressing on her complaint. On this

occasion she told him that Kortright was continuing to harass her, but he still gave her no assurance that her complaint would promptly be acted upon; he could not even give her a time frame (T124-25). He did indicate, though, that he was forwarding her complaint to his supervisor in Washington (T126). However, when she spoke to that individual the next day, the supervisor knew nothing of her complaint and expressed anger at petitioner for having bothered her (T126-28).

The following week, petitioner went to see a psychologist, whom she continued to see through March, 1985. In the meantime, following her September 12, 1984 conversation with Eastman's Washington supervisor, petitioner did not return to work; instead,

she remained at home. In October, 1984, when she attempted to leave home, she experienced a panic attack, following which her psychologist referred her to a psychiatrist who prescribed medication for her panic reaction (T129-35). Following this, she never returned to Amtrak and she has since been unable to return to normal office work.

Petitioner's treating physician and psychiatrist both testified that she suffers from agoraphobia, a form of "panic disorder" (Howell 45; Orlosky 10), which the psychiatrist testified is a permanent condition (Orlosky 27-28). Both doctors testified that the precipitating cause of this condition was the sexual harassment plaintiff suffered at work (Howell 56; Orlosky 26-27). Neither doctor

testified that there was anything abnormal or peculiar about petitioner or that it was abnormal for sexual harassment to cause stress or anxiety which could endanger the victim's health. Moreover, petitioner's physician specifically rejected the notion that she had a predisposition to panic attacks, with the doctor noting that petitioner had endured other quite stressful situations which had not provoked panic attacks (Howell 55-57, 74-77). In this vein, the most that defense counsel was able to elicit from petitioner's medical witnesses (there were no defense medical witnesses) was testimony by petitioner's psychiatrist to the effect that patients suffering from panic attacks usually have some preexisting sign of anxiety vulnerability (Orlosky

52, 88-89, 101). In addition, petitioner's psychologist testified that her medical history, which included ulcer attacks and cancer surgery in her 20's, would "have a tendency to make somebody more vulnerable"--although he was firm that petitioner did not previously have "emotional problems" (Belt 28).

In addition to petitioner's testimony concerning the severe stomach pains and episodes of vomiting, including vomiting blood, she had been caused to suffer as a result of Kortright's harassment (T111-13), there was also testimony, through her physician, of other physical symptoms she had suffered as a result of this harassment. These included cold hands, shaking, dizziness and radiating pain (Howell

46, 51), as well as serious side effects from required medication (id. 60, 63-64, 67).

At the time of these incidents petitioner was in her early thirties (T33). She first worked for Amtrak from 1975 to 1980, when she left because her marriage, her second, was failing and her father was dying of cancer (T40-41, 43). She returned to Amtrak in August, 1983, shortly thereafter receiving a promotion (T45-51). There was no evidence that she was anything other than a stable, reliable employee, and Summa, for whom she worked for over six months, testified that he was completely satisfied with her work (T585).

It is Amtrak's declared policy that "[s]exual harassment is illegal and contrary to Company policy" (JA 120). It is Amtrak's policy

> to foster a work environment free of sexual discrimination, intimidation, and insult. Amtrak prohibits any employee...from making unwelcome and unsolicited sexual advances...or engaging in other verbal or physical conduct of a sexual nature, when (a) submission to such conduct is made explicitly or implicitly a term or condition of employment...or (c) such conduct creates an intimidating, hostile or offensive working environment.

(id.; see also JA 123). Such prohibited conduct is specified to include "offensive remarks or gestures of a sexual or suggestive nature" and "unwelcome physical contact" (JA 120 and 123). In addition, Amtrak also recognizes that "an 'intimidating, hostile or of-

fensive working environment' is defined by the aggrieved employee" (JA 124), and it declares that it is "the Supervisor's responsibility to safeguard the sensibilities of the most sensitive employee" (id.). It is the responsibility of the non-involved supervisor or Affirmative Action Office employee who receives a complaint of such harassment "to conduct a prompt and thorough investigation of all the circumstances surrounding the alleged incident" (JA 121), and supervisors are required to "take all steps possible to eliminate any harassment they become aware of" (id.), including "initiat[ing] disciplinary action whenever it appears a violation of this policy may have occurred" (id.).

The Charge Conferences and Charge

Despite the absence of any evidence to support this, and notwithstanding Amtrak's own policy-statements recognizing that sexual harassment can create an intimidating, hostile or offensive working environment (JA 120, 123), at the charge conferences, the court was insistent that no "normal" or "rational" person would have reacted to Kortright's harassment as had petitioner (JA 23, 26, 30). In addition, again with no basis in the record, it insisted that petitioner had had an "unhappy life experience...which made her extraordinarily susceptible to damage from any sexual contact whatever" (JA 49). Thereafter, in its charge, which was largely extemporaneous, with the court radically departing from what

it had earlier indicated it would be instructing the jury (see, e.g., JA 103: court not even able to recall whether it had defined negligence), the court became in effect a defense witness, repeatedly suggesting that there was evidence indicating that in fact plaintiff was "abnormal," with a "very inordinate susceptibility to this kind of thing" (JA 90-91; see also JA 95-96), and, immediately following this misstatement of the evidence, the court instructed the jury that Amtrak's duty of care toward petitioner was only such as would suffice to protect the "ordinary" or "normal" or "perfectly normal" person (JA 91).

In thus charging the jury the court abandoned its earlier representation, at the final charge conference,

that it would not be telling the jury that petitioner was "peculiar" and that negligence is to be judged by what is sufficient to protect the "generality" of persons (JA 60). Also, it omitted its earlier proposed instruction that Amtrak was required to use reasonable care "to minimize the instances of [sexual] harassment to the extent possible [and to] contain[] the damage, if such should occur" (JA 50). Compare petitioner's request to charge No. 7: "Negligence is the failure to exercise that degree of care which a reasonably careful and prudent person would have exercised under the same circumstances...." (JA 11); see also JA 29, 32-33, 42, 55-56: counsel urging that issue was whether Amtrak had acted reasonably based on what was known to it.

In addition to these errors, declaring that it had "never seen" an appellate opinion applicable to a case it was trying, the court refused to charge on causation in accordance with Rogers v. Missouri Pac. R. Co., 352 U.S. 500 (1957) (JA 36-37). Instead, it instructed the jury that, in order to find for the petitioner, it would have to find that

> defendant's failure to use reasonable care was a cause of the sexual events, and that the extent of [petitioner's] injuries resulted directly from these events

(JA 96). Compare 352 U.S. at 506 (issue whether "employer negligence played any part, even the slightest, in producing the injury").

The Jury's Note and Verdict

In the course of its deliberations, the jury sent out a note stating, in part:

> We feel that sexual harassment took place. We do not feel Amtrak was negligent in its response to charges. We, therefore, feel no compensation should be paid....Please advise.

(JA 116). In response to this note, the court told the jury that this meant that the jurors should render a verdict for the defendant (JA 119). On this basis the jury was polled, rendering a verdict in Amtrak's favor (T792-93).

The Memorandum of Affirmance

In its summary order of affirmance, the Court of Appeals held that the district court's charge was a "fair statement of FELA law as it should apply to the circumstances of this

case" (3a). It further stated, "The court's references to plaintiff's possible over-susceptibility to injury from conduct of the type complained of were appropriate in light of the evidence and the arguments of counsel" (id.). This was presumably intended as a complete answer to petitioner's arguments that the district court's charge misstated the evidence and, related to this, incorrectly instructed the jury on Amtrak's duty of care toward petitioner. The Court of Appeals made no reference to petitioner's complaint with respect to the instruction on causation.

With respect to the Court of Appeals' reference to the evidence as purportedly justifying the trial court's statements concerning "possible

over-susceptibility to injury from this type of conduct" (3a), we would reiterate that there was no such evidence. Moreover, there was no evidence that only a person who was abnormal could suffer stress leading to injury by reason of the prolonged harassment here complained of. Nor was there any evidence, apart from Amtrak's own policy statements (JA 120, 123), as to how the typical range of victims might be affected by such conduct, although it was plain on this record that petitioner, who was not shown to be abnormal, felt both offended and threatened by Kortright's continuing conduct and that Amtrak was on clear notice of this fact.

As to the "arguments of counsel" supposedly justifying this charge,

we would note that the idea that petitioner was somehow abnormal or peculiar, with extreme susceptibility to injury by reason of sexual harassment, was entirely the invention of the district court, which consistently overruled the objections of petitioner's counsel that there was no such evidence (see, e.g., JA 25-29, 55-56), just as it rejected counsel's repeated urgings that the issue of negligence here turned on whether Amtrak had acted reasonably based on what was then known to it (e.g. JA 29, 32-33, 42, 55-56). Based upon these factually unsupported and legally incorrect rulings, petitioner's counsel did thereafter in his summation attempt to counter this argument which he was aware would be before the jury (see T 639-44; see also JA 56

[defense counsel embracing court's suggestion of abnormality] and T721 [defense summation]). But under no fair view can these errors in the court's charge be attributed to petitioner's counsel.

REASONS FOR GRANTING THE WRIT

1. THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY TO PROVIDE CRITICALLY NEEDED GUIDANCE CONCERNING HOW JURIES SHOULD BE INSTRUCTED ON THE ISSUE OF NEGLIGENCE IN BUELL-TYPE ACTIONS, INCLUDING ACTIONS BASED ON SEXUAL HARASSMENT.

In Atchison, Topeka & Santa Fe R. Co. v. Buell, 480 U.S. 557 (1987), this Court, while leaving open the question of whether the FELA would support a claim based exclusively on "wholly mental" or "purely emotional" injury, 480 U.S. 567 and 570 n. 22, clearly suggested that this "broad reme-

dial statute" (id. at 562) might well be held to support such a claim, although this "might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity" (id. at 568). Buell also plainly suggested that a "mental injury" claim under FELA would lie where, as here, there was both such traditional tortious conduct as assault and battery and severe physical symptoms, see 480 U.S. 577 n. 22, a view which, at least as a practical matter, was markedly reinforced when, one week later, this Court denied certiorari in Norfolk & Western R. Co. v. Lancaster, 480 U.S. 945 (1987), where, in a comprehensive and carefully reasoned opinion for the Seventh Circuit, Judge Posner had

pointed out why allowing recovery under such circumstances would represent no unwarranted extension of the FELA. See Lancaster v. Norfolk & Western R. co., 773 F.2d 807 (1985).

To be sure, the exact parameters of what will be held actionable under Buell remain to be finally determined. Compare, for example, Hammond v. Terminal R. R. Ass'n of St. Louis, 848 F.2d 95 (7th Cir. 1988), cert. denied, 57 U.S.L.W. 3552 (February 21, 1989), and Adkins v. Seaboard System R. R., 832 F.2d 340 (6th Cir.), cert. denied, 108 S. Ct. 452 (1987), holding against liability, with Pierce v. Southern Pac. Transp. Co., 823 F.2d 1366, 1372 n. 2 (9th Cir. 1987), and Halko v. New Jersey Transit Rail Operations, Inc., 677 F. Supp. 135 (S.D.N.Y. 1987),

both allowing recovery where emotional distress led to victim's death. But it can be anticipated that our courts will be increasingly faced with such claims, including claims based on sexual harassment. See Amendola v. Kansas City Southern Ry. Co., 699 F.Supp. 1401, 1407-11 (W.D. Mo. 1988) (collecting cases). See also Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (discussing sexual harassment in context of Title VII claim); R. Sandroff, "Sexual Harassment in the Fortune 500," Working Woman, December 1988, p. 69 (reporting results of 1988 survey of Fortune 500 manufacturing and service companies); "Statement [of American Psychiatric Association] on Discrimination Based on Gender or Sexual Orientation," Am. J. of Psychiatry, November 1988, p. 1494

(identifying sexual harassment as a "potentially severe occupational stressor[]").[3] And, presumably, it was this Court's intention in Buell that all such plaintiffs were to have their claims "fairly weighed." Compare Steinhauser v. Hertz Corp., 421 F.2d 1169, 1172 (2d Cir. 1970) (Friendly, J.) (infant plaintiff who had been neither "perfectly normal" nor schizophrenic prior to accident entitled to have her theory of defendant's liability fairly weighed by jury); see also Bentley v.

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[3] Compare Matter of Crookston v. Brown, 140 A.D.2d 868, 869-70, 528 N.Y.S.2d 908, 909-10 (3rd Dept. 1988) (describing sexual harassment as among the most demeaning and offensive torments an employee can undergo and noting that many victims will suffer devastating psychological and physical symptoms).

Stomberg-Carlson Corp., 638 F.2d 9, 11 (2d Cir. 1981) (citing this Court's decision in Quercia v. United States, 289 U.S. 466 (1933), for proposition that it was error depriving age discrimination plaintiff of a fair trial, and indeed tantamount to directing a verdict for the defendant, where the trial court in its charge unfairly summarized the evidence); McGlothan v. Pennsylvania R. Co., 170 F.2 121, 125 (3rd Cir. 1948) (unfair charge in FELA case).

In this regard we would note that not only was petitioner grievously prejudiced by the trial court's repeated remarks indicating that she was abnormal or peculiar, but also, compounding this unfairness, she was equally grievously prejudiced by the

court's measure of duty instruction. As petitioner's counsel tried, unsuccessfully, to point out to the court, the concept of negligence is not based on what will suffice to protect some idealized "perfectly normal" person. Rather, it is based on ordinary care under the circumstances. See, e.g., 3 Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions, Civil (4th ed. 1987), §§94.02, 94.04, 94.05, 94.10; 3 Harper, James & Gray, The Law of Torts (2d ed. 1986), §§16.12 and 16.19; Prosser & Keeton, The Law of Torts (5th ed. 1984), §31-33; cf. Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), reversed 312 U.S. 492 (1941) (L. Hand, J.) (likelihood that conduct will injure others, taken together with seriousness of injury if it

happens, balanced against interest which must be sacrificed to avoid risk); Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928) (Cardozo, J.) (negligence relative to need and occasion); see also Eaton v. Long Island R. co., 398 F.2d 738, 742 (2d Cir. 1968) (ease with which defendant could have taken effective measures to eliminate or reduce risk posed). It includes the obligation to regulate one's conduct with a view to a range of other people's disabilities and frailties. 3 Harper, James & Gray, The Law of Torts (2d ed. 1986), §16.12, p. 494; id. §18.4, pp. 691-92; cf. Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913). And here, it is submitted, it required consideration of the fact that petitioner had complained

repeatedly of Kortright's conduct and was obviously most offended and disturbed and frightened by that conduct. It also required consideration of the fact that workplace sexual harassment is both unlawful and recognized as a source of occupational stress and anxiety. See, e.g., Prosser & Keeton, The Law of Torts (5th ed. 1984), §36; see also id., §43.

Of course, what we are talking of here is really nothing more than basic negligence doctrine and what is the duty of a trial court in instructing a jury. But, as the cases and commentaries all indicate, these negligence concepts are subtle and their interaction and application to particular factual situations can be most complex, including consideration of who

should bear the risk of loss, the innocent plaintiff or the defendant, and what social policies will be advanced by, for example, holding an actor to strict adherence to statutory requirements of conduct. See, e.g., Prosser & Keeton, the Law of Torts (5th ed. 1984), §36. Compare, Buell, 480 U.S. at 568 (FELA liability can turn on "subtle and intricate distinctions").

Moreover, as Buell pointed out, here we are in a still rapidly evolving area of tort law. See 480 U.S. at 568-70. And, as this case unfortunately so amply demonstrates, there will be trial judges who are insensitive to, or even biased against, the claims of plaintiffs in such actions, who will not perceive how any but the "abnormal" or "peculiar" could

be injured by such conduct, and whose attitudes toward such claims will undoubtedly affect how in such cases they instruct juries.

This case presents this Court with the opportunity to demonstrate that Buell was not intended as an empty promise, that this Court meant what it there said concerning the FELA being a "broad remedial statute." 480 U.S. at 562. This case presents the opportunity for this Court to make it clear to the lower courts that plaintiffs such as this petitioner are entitled to have their claims seriously and properly considered and fairly tried.

In addition, this case presents the opportunity for this Court to emphasize how careful trial courts must be in distinguishing for the jury be-

tween the care that is due to protect the range of persons who reasonably might be harmed--to any appreciable degree--by an actor's action or inaction and the fact that a particular victim may in fact have suffered unusually severe consequences as a result of the actor's negligence. Even such "eggshell" plaintiffs are entitled to be protected from the actor's negligence. See Prosser & Keeton, The Law of Torts (5th ed. 1984), §43; Steinhauser v. Hertz Corp., 421 F.2d 1169. And, in the case of Buell-type plaintiffs, it is especially important that this distinction be made clear. Like the plaintiffs in Buell and Lancaster, this petitioner suffered a most severe reaction to harassment which others, not all, but certainly

many others, might well be able to survive without any great harm. But that does not suffice to render Amtrak's conduct in this case not negligent.

If plaintiffs in such cases are to have their claims treated as was petitioner's, then Buell will be rendered a truly hollow promise. This case affords this Court the opportunity to point out that the employer's duty of care in such cases is not merely to protect some idealized "perfectly normal person," nor, where there is actual notice of such harassment, even some undefined "generality" of persons. Rather, as petitioner's counsel repeatedly, but unsuccessfully, urged the trial court, the employer's duty of care is also a function of what has

been made known to it concerning such harassment. It should not be enough to enable the employer to avoid liability that the victim's reaction to such harassment was in fact more severe than might ordinarily be expected. It is enough to find liability that the employer was on notice of the potential for some harm but nonetheless failed to act reasonably to provide the employee with a safe place to work.

Finally, this case presents this Court with the opportunity to point out that with specific reference to workplace sexual harassment, which is both illegal and recognized as a hazard to the health of its victims, it is not enough for the employer to have a formal policy prohibiting such conduct, but which it is unwilling to

enforce. Title VII's prohibition of such conduct and what Congress, the courts and modern psychiatry have all said as to how wrong and harmful this is should suffice to require, as does Amtrak's own stated policy, that complaints of such conduct be promptly and thoroughly investigated and, where there is substance to the complaint, that immediate action be taken to protect the victim. There is nothing "subtle" about such conduct (Buell, 480 U.S. at 568), nor does its being held actionable require application of "intricate distinctions" (id.). It is illegal; it serves no valid work purpose; and it is plainly a hazard to the health of its victims. When it is brought to the attention of the employer, the employer must be required

to take strong, positive, immediate, and appropriate steps to prevent its recurrence.

2. THIS CASE ALSO PRESENTS THE OPPORTUNITY FOR THIS COURT TO REAFFIRM THE NEED FOR PROPER INSTRUCTIONS ON CAUSATION IN FELA CASES.

Although it is generally accepted that in FELA cases the court must follow the Rogers decision in instructing the jury on causation, see, e.g., Sand, Siffert, Reiss, Sexton & Thrope, Modern Federal Jury Instructions, par. 89.02[4], as this case illustrates, how the concept of causation figures in a negligence case, especially in a case where there are multiple actors whose negligence could have contributed to the plaintiff's injury, is not always clear. See generally 4 Harper, James & Gray, The Law of Torts

(2d ed. 1986), §§20.2 and 20.3; Prosser & Keeton, The Law of Torts (5th ed. 1984), §41, pp. 270-72. Cf. Price Waterhouse v. Hopkins, U.S. , , 57 U.S.L.W. 4469, 4479 (May 1, 1989) (O'Connor, J., concurring). And, it is submitted, if this case is properly analyzed in terms of the various Amtrak employees whose negligence might have contributed to petitioner's injury, it is apparent that petitioner was grievously prejudiced by the district court's refusal to charge in accordance with Rogers.

In this case the issue of causation did not relate simply to whether petitioner's injury resulted from Kortright's harassment. Here, the issue of causation included also whether the negligence of any number of

Amtrak employees, for example, Summa, Thompson, Sullivan or Eastman, contributed in any way, however slight, see Rogers, 352 U.S. at 506, to petitioner's injury. It included, for example, whether Summa negligently failed to report to his superiors, as Amtrak policy clearly required him to, petitioner's complaints of Kortright's continuing harassment. It likewise included whether Sullivan, Thompson and Eastman each did what reasonably they should have done based on what they were on notice of. See 45 U.S.C. §51 (issue whether plaintiff's injury "result[ed] in whole or in part from the negligence of any of the officers, agents, or employees of such carrier"). Compare Meritor Savings Bank v. Vinson, 477 U.S. at 75 (Marshall, J., concur-

ring) (employer can only act through individual supervisors and employees; discriminatory acts may take place in defiance of company policy). On this issue a proper Rogers instruction undoubtedly would have been of immeasurable help to this jury. But, because the trial court, which had "never seen" an appellate opinion applicable to a case it was trying (JA 37), refused to charge in accordance with Rogers, this jury was never required to focus clearly and carefully on this so fundamental issue, which, even apart from the trial court's unfair comments on the evidence and its incorrect instruction on duty, could well explain this jury's otherwise inexplicable finding that Amtrak was not negligent toward plaintiff.

Moreover, quite apart from the fact that a proper Rogers instruction would have assisted this jury in assessing the individual negligence or non-negligence of each of these various actors, it is submitted that this error in the charge is not mooted by reason of the jury's indication in its note that it did not feel Amtrak was negligent in its response to plaintiff's complaints. In negligence law the concept of causation is both subtle and complex. And in the case of FELA actions, causation takes on an even more important meaning. To be sure, causation may be analyzed as distinct from negligence, but plainly in the ordinary FELA case a proper Rogers instruction can have broad effect on a jury's view of the case and in its evaluation of

whether the defendant should be held liable to the injured plaintiff. Compare Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963); Webb v. Illinois Central R. Co., 352 U.S. 512 (1957). In addition, before it may properly be held that a failure in such a case to charge in accordance with Rogers was harmless, based on a jury's "finding" of no negligence, it is necessary to consider whether in fact the negligence finding was itself proper, including whether it was based on a correct negligence instruction. Further, it is also necessary to consider with what sort of precision and care the jury made its purported finding of no negligence.

In this regard we would note that in this case defense counsel had

himself during the charge conferences acknowledged how related were the concepts of negligence and causation when he indicated that he expected that the negligence instruction would be "integrated" with the court's instruction on causation (JA 51), which in fact it was (JA 95-96). And, as a matter of common sense, it is obvious that this lay jury, which was not a panel of legal scholars, and which had not been asked to separately address on the verdict sheet the issues of negligence and causation, may well not have distinguished between these concepts, especially in the context of this overall so inadequate and misleading charge, and certainly the jury's note does not evidence such careful distinction. Also, had the court charged in accordance

with Rogers, this might well have served to impress upon the jury something of the nature and purpose of the FELA, which, as Rogers and its progeny so plainly indicate, was not intended to be applied in so crabbed a fashion as the district court's overall charge in this case suggested. Cf. Buell, 480 U.S. at 562.

Plainly, it was error here for the court not to have charged in accordance with Rogers, and there is no fair basis for holding that this error was harmless. This case presents this Court with the opportunity to reaffirm the need for a proper causation instruction in cases such as this.

CONCLUSION

Stripped to its essence, this is a case about discrimination and harassment, comparable in many respects to racial or ethnic discrimination. See Meritor Savings Bank v. Vinson, 477 U.S. at 65-67. Further, it is about conduct which is not merely cruel, but also can be hazardous to the health and wellbeing of its victims. It is about a young woman who was entitled by law, as well as Amtrak's own express policy, to a workplace free of such conduct. And it is about her right to a fair trial on her claim that her disabling condition was caused by Amtrak's negligence in allowing Kortright to so cruelly harass her. Were this a case involving racial or ethnic discrimination, or were it one where petitioner

was physically attacked by Kortright, we feel certain this Court would not allow to stand a defendant's verdict rendered on a record comparable to this. It would undoubtedly, we believe, hold that a new trial was required by reason of the trial court's misunderstanding of the law and the evidence and the errors in the charge reflecting that misunderstanding.

No less is due here. This case presents this Court with the opportunity to send out a clear message to the lower courts that it meant what it said in Buell. It likewise presents the opportunity for this Court to make clear to the courts, as well as to employers and the victims of sexual harassment, that it takes most seriously this so cruel and hazardous form of

discrimination. Based upon the errors which occurred at this trial, this Court should grant the writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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May 31, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of February, one thousand nine hundred and eighty-nine.

P R E S E N T :

HON. GEORGE C. PRATT,

HON. FRANK X. ALTIMARI,

Circuit Judges,

HON. LEONARD B. SAND,

District Judge,
Southern District
of New York,
sitting by
designation.

UNITED STATES
COURT OF
APPEALS
SECOND CIRCUIT

Filed
Feb. 6, 1989

Elaine B.
Goldsmith,
Clerk

----------X

MARGARET HUDSON,

Plaintiff-Appellant,

-against-

Docket No.
88-7733

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellee.

----------X

This appeal from a final judgment of the United States District Court for the Southern District of New York, Knapp, Judge, dismissing plaintiff's complaint under the Federal Employers' Liability Act (FELA) (45 U.S.C. §51 et seq.), came on to be heard on the transcript of the record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered that the judgment appealed from be and hereby is affirmed.

Margaret Hudson appeals from this judgment entered after a jury verdict in favor of the defendant, claiming that the trial court's charge to the jury, insofar as it concerned negligence and causation and identified those Amtrak employees who had a duty

to Hudson as "managerial employees", was improper and misleading. The charge given by the district court was a fair statement of FELA law as it should apply to the circumstances of this case. The court's references to plaintiff's possible over-susceptibility to injury from conduct of the type complained of were appropriate in light of the evidence and arguments of counsel. Plaintiff received a fair trial.

/s/
George C. Pratt, U.S.C.J.

/s/
Frank X. Altimari, U.S.C.J.

/s/
Leonard B. Sand, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of March, one thousand nine hundred and eighty-nine

PRESENT:

Hon. George C. Pratt, C.J.

Hon. Frank X. Altimari, C.J.

Hon. Leonard B. Sand, D.J.

CIRCUIT JUDGES,

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed
March 13, 1989

Elaine B. Goldsmith, Clerk

---X

MARGARET H. HUDSON,

Plaintiff-Appellant,

-against-

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellee.

Docket No. 88-7733

---X

A petition for rehearing having been filed herein by Plaintiff-Appellant MARGARET H. HUDSON.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

By: FRED M. CASSIDY
Chief Deputy Clerk.

MEMORANDUM DECISION AND ORDER
OF HON, WHITMAN KNAPP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

MARGARET H. HUDSON,

Plaintiff-Appellant,

-against-

NATIONAL RAILROAD PASSENGER CORPORATION,

Defendant-Appellee.

Memorandum and Order

86 Civ. 5794 (WK)

----------X

WHITMAN KNAPP, D.J.

Plaintiff moves pursuant to Fed. R. Civ. P. 59 for a new trial. The motion is based solely on the claim that the court committed error in its charge concerning negligence. Because no exception was ever taken to the challenged portion of the charge, the motion is denied.

At the close of its charge, the court invited counsel into the robing room, where a discussion of considerable length occurred (T. 28-33).[1] This was followed by some additional instructions to the jury (T. 33-35), a side bar requested by defense counsel (T. 35-37), further instructions (T. 37-41), "one last side bar" requested by plaintiff's counsel (T. 41), and one more instruction to the jury (T. 41-42). Not once during all of these discussions did plaintiff's counsel so much as suggest the error about which he now complains.

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[1] "T." refers to the transcript of the court's charge, and "1." refers to a line of that transcript.

During the robing room conference, plaintiff's counsel requested charges on work and life expectancy (the latter was granted), and then stated, "That's the only request I have" (T. 29 l. 14). Defendant's comments on the charge prompted a general discussion on the question of negligence, in which plaintiff's counsel participated (T 29 l.24 - 31 l. 17). However, plaintiff's counsel made no objection to anything the court had said; he took exception only to the court's intention to clarify--and to some extent repeat--its instructions concerning the responsibility of managerial personnel (T 31 l. 1-15). Plaintiff's counsel then proposed that the term "supervisor" be used, rather than

"managerial personnel," a suggestion which the court adopted (T. 32 l. 19-22).

The topic of the first sidebar was comparative and contributory negligence. Plaintiff's counsel participated in the discussion and noted his exception to the court's resolution of the question (T. 37 l.2). The "one last side bar" requested by plaintiff's counsel was devoted to the question of the burden of proof on contributory negligence, and the court agreed with his position, leading to one final instruction (T. 41 l.21 - 42 l.14).

Moreover, even if the plaintiff's suggested charge had been requested at the appropriate time, the court would have been obligated to deny

it. Plaintiff's basic contention is that the jury was not alerted to the possibility that Amtrak might have been aware of plaintiff's "eggshell" condition. However, there is not a scintilla of evidence to suggest that Amtrak had any such awareness.

For the foregoing reasons, plaintiff's motion for a new trial was denied. We accordingly direct the Clerk to enter an appropriate judgment dismissing the complaint, with costs to be taxed.

SO ORDERED.

DATED: July 5, 1988
New York, New York

/s/
WHITMAN KNAPP, U.S.D.J.

Supreme Court, U.
FILED
JUL 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.: 88-1985

IN THE

Supreme Court of the United States

October Term, 1988

MARGARET HUDSON,

Petitioner,

against

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Table of Contents.

	Page
Preliminary Statement	1
Statement of the Case	2
Statement of Facts	5
Petitioner's prior employment history; a pattern of repeated job changes	5
Petitioner's successful real estate career after leaving Amtrak	6
The sexual harassment and the alleged notice to Amtrak	7
The evidence refuting petitioner's claims and establishing that Amtrak acted reasonably	9
The medical evidence	12
The charge conferences	14
The mini-charge and summations	16
The court's charge	17
The jury's verdict and the Second Circuit's decision	18
ARGUMENT:	
I. Certiorari should be denied since petitioner's failure to object to the charge or to raise her claims below precludes her from raising them on appeal	19

Page

II. Certiorari should be denied since this case presents no significant legal issues. In addition, petitioner's charge issues are completely without merit. The Court's charge fairly presented the law as it applies to this case 21

The charge was fair and correct 22

The alleged emphasis on petitioner being abnormal 23

Amtrak's duty of care owed to petitioner 24

Causation 25

CONCLUSION. The petition for certiorari should be denied 26

TABLE OF AUTHORITIES.

Page

CASES:

Air Et Chaleur, S.A. v. Janeway, 757 F.2d 489, 492 (2d Cir. 1985) 19

Almonte v. National Union Fire Ins. Co., 787 F.2d 763, 767 (1st Cir. 1986) 20

Andres v. Roswell-Windsor Village Apts., 777 F.2d 670, 673 (11th Cir. 1985) 22

Dacchille v. New York World Tel. Corp., 20 A.D.2d 892, 248 N.Y.S.2d 1021 (2d Dep't 1964), *aff'd*, 15 N.Y.2d 923, 258 N.Y.S.2d 845 (1965) 24

Denniston v. Burlington Northern, Inc., 726 F.2d 391, 393 (8th Cir. 1984) 26

Page

Fernandez v. Fitzgerald, 711 F.2d 485, 487 (2d Cir. 1983) 22

Furr v. AT&T Technologies, Inc., 824 F.2d 1537, 1549 (10th Cir. 1987) 22

Levine v. City of New York, 309 N.Y. 88, 92-93 (1955) 24

Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 212 (9th Cir. 1988) 22

National Railroad Passenger Corporation v. 25,000 Sq. Ft. Parcel of Land, 766 F.2d 685, 688 (2d Cir. 1985) 22

Palsgraf v. Long Island R. Co., 248 N.Y. 339 (1928) 24

Peck v. Ford Motor Co., 603 F.2d 1240, 1246-47 (7th Cir. 1979) 24

Robertson v. Shapiro, 646 F.2d 734, 742 (2d Cir. 1981) 19

Robinson v. Monsanto Co., 758 F.2d 331, 335 (8th Cir. 1985) 22

Rogers v. Missouri Pacific R. Co., 325 U.S. 500 (1957) 25

OTHER AUTHORITIES:

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3 Harper, James & Gray, *The Law of Torts* § 16.9 (2d ed. 1986) 24

Prosser & Keeton, *The Law of Torts* § 31, at 170 (5th ed. 1984) 24

No. 88-1985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988.

MARGARET HUDSON,

Petitioner,

against

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Preliminary Statement

In this action brought under the Federal Employers' Liability Act (FELA), petitioner Margaret Hudson seeks a writ of certiorari to review the summary order of the United States Court of Appeals for the Second Circuit dated February 6, 1989, which affirmed the judgment of the U.S. District Court for the Southern District of New York (Knapp, J. and a jury) entered July 25, 1988 on the jury's unanimous verdict in favor of respondent National Railroad Passenger Corporation (Amtrak).

Statement of the Case

Petitioner claims she suffered emotional injury as a result of allegedly being sexually harassed by a co-worker (Edward Kortright) while she worked at Amtrak's Crew Base area in New York's Penn Station. Petitioner commenced this FELA action against Amtrak alleging that it negligently failed to prevent the sexual harassment and thereby failed to provide her with a safe place to work. After a full trial, the jury found that, while plaintiff had been harassed by Kortright, Amtrak was not guilty of negligence. The Second Circuit affirmed the verdict, rejecting the various unpreserved jury charge issues raised by petitioner on appeal.

This Court should similarly reject petitioner's request for a writ of certiorari. Notwithstanding petitioner's attempt to present this as a case involving burning social issues which should be resolved by the nation's highest court, this is in fact an ordinary negligence case which turned entirely on the jury's resolution of disputed factual issues. The case presents no significant issue of law, and the summary decision of the Second Circuit, to the extent it even considered any legal questions, does not conflict with the decision of any other Circuit Court. Furthermore, the jury charge issues now raised by petitioner were not preserved for review since they were never raised during trial before the district court.

In an attempt to engender sympathy and to manufacture issues for this Court's review, petitioner presents a one-sided version of the evidence and an unfairly slanted description of the district court's charge. Petitioner thus hopes to create the impression that the jury's rejection of her claim was a grave miscarriage of justice which could only have been the product of a defective jury charge. Contrary to petitioner's claim, however, a balanced view of

the evidence shows that the jury's verdict was fully supported by the proof and that the court's charge was entirely proper.

For example, petitioner's case is premised on the claim that Kortright harassed her continually from March through August of 1984, during which time Amtrak management allegedly ignored her repeated pleas for help. Amtrak's proof, however, established that when it was first informed of the alleged harassment in mid-March, Kortright was immediately warned by his supervisors to leave petitioner alone. Thereafter, no further alleged incidents were reported to Amtrak until petitioner filed her EEO complaint in August. Petitioner's own EEO complaint supports Amtrak on this point, moreover, since contrary to her trial testimony of continual harassment, her complaint alleges no incidents of harassment for four months after Kortright was admonished in March. The proof also established that Amtrak immediately acted on petitioner's EEO complaint once it was filed and brought Kortright up on appropriate charges. Those charges had to be dropped, however, because petitioner failed to attend hearings or otherwise pursue her allegations of harassment, other than through this lawsuit.

Similarly, petitioner asserted at trial that she was forced to leave Amtrak in September of 1984 because she was emotionally disabled as a result of the alleged harassment. However, petitioner's own medical evidence showed that whatever emotional problems she had long predated the alleged harassment, and her brief employment at Amtrak's Crew Base was consistent with her prior 10-year work history in which she held no less than 12 different positions, rarely staying at any one more than a few months. Petitioner's claim of disability was also refuted by the evidence that, after leaving Amtrak in 1984, she obtained a real estate license and has since enjoyed a successful career

selling real estate, although continuing her life-long pattern of frequent job changes.

As for the court's charge to the jury, it was entirely fair and proper. To support her claim for a million dollar damage award, plaintiff produced the testimony of three medical experts who claimed that plaintiff's fragile mental condition was such that the relatively minor incidents of harassment by Kortright allegedly devastated her emotionally. Since Amtrak was concededly unaware of plaintiff's alleged susceptibility to sexual harassment, the court charged the jury that Amtrak had no duty to take extraordinary precautions to protect her from such harassment. Amtrak was only obligated to exercise reasonable care so as to protect the ordinary person at its workplace. Pursuant to petitioner's counsel request, the court further charged that if Amtrak was found negligent it was liable for all resulting injuries suffered by petitioner, even if those injuries were enhanced by any susceptibility on her part. This was a correct charge, and contrary to petitioner's new assertion on appeal, at no time during its charge did the court inform or even hint to the jury that it believed that petitioner was in some way abnormal.

In short, and all of petitioner's rhetoric aside, this case presents nothing more than a highly dubious tort claim that was met with convincing opposing proof and that was rejected by a jury. Petitioner has attempted to obtain a second trial, first by raising a host of unpreserved and meritless charge issues before the Second Circuit, and now by attempting to persuade this Court that the case presents important issues of law and public policy. However, the only way the interests of public policy will be served in this case is by once and for all laying it to rest. The petition should be denied.

Statement of Facts

Petitioner's prior employment history; a pattern of repeated job changes

Petitioner worked at the Amtrak Crew Base for a six month period from March 1, 1984 until September 12, 1984. Petitioner claims that she left this job because of severe emotional problems caused by Kortright's alleged harassment which Amtrak allowed to occur. A review of petitioner's employment record, however, reveals that her brief employment at Amtrak's Crew Base was consistent with her prior work history. Indeed, in her ten year work-life prior to working at Crew Base, petitioner held twelve different positions, most for only a few months.

During the year and a half after she graduated from secretarial school in December 1979, petitioner changed jobs three times. She first worked as a legal secretary at a law firm for five months from January to May, 1974; at another law firm for about four months from June to September, 1984; and at a third firm from about October 1974 to July 1975, approximately nine months (T35-38, 155).*

In July 1975, petitioner began working for Amtrak in Washington, D.C., in revenue accounting (T38-39). Ten months later she transferred to Amtrak's Philadelphia office (T39, 155-56). In August 1980, she resigned from Amtrak (T40-41) and began her own business doing typing at home for small businesses (T44, 157-8).

In the fall of 1981, petitioner went to work for New Jersey National Bank (T44). In the fall of 1982, she left that

*Numbers in parentheses preceded by "T" refer to pages of the trial transcript. Numbers preceded by "A" refer to pages of the joint appendix in the Second Circuit. References to the separately transcribed medical testimony are preceded by the witness' name.

job to work for a small company in West Trenton, New Jersey (T44). In May 1983, she went to work for an accounting firm for three months (T45).

Petitioner returned to work for Amtrak in August 1983 in the engineering department in Philadelphia (T45, 158), where she remained for three months. In November 1983, she transferred to Amtrak in New York (T51-52) where she worked in the labor relations department in Penn Station for three months. In March 1984, she voluntarily took a demotion and transferred to the Crew Base to work as a secretary, where she remained for six months until September 1984 (T55-56, 159).

Petitioner's successful real estate career after leaving Amtrak

Although plaintiff claimed to be emotionally disabled when she left Amtrak in September 1984, the proof established that in December 1984 she and her husband successfully completed a course in real estate (T142). In one of her subsequent job applications for a real estate position, petitioner gave her reason for leaving Amtrak as "career change." In that application, petitioner stated that she chose real estate as a career "for the ability to earn a living in direct proportion to the effort I'm willing to put into my career" (A148).

In January 1985, four months after she left Amtrak, petitioner and her husband successfully sat for the state real estate exam and both received their real estate licenses (T143). In March 1985, after one month on her first real estate job, petitioner sold her first house (Testimony of Barry Belt at 113-14).

One month later, petitioner changed jobs and began working for Century 21 as a sales associate (T216, 221).

While at Century 21, in 1985, petitioner became a member of the Million Dollar Club by selling a million dollars worth of property (T218). In the fall of 1986, she was promoted to sales manager (T221), with her responsibilities including the "organization and motivation of sales force, recruiting, listing and sales" (A148). She also took a course, "Effective Financing", as a part of her continuing real estate education (T219). Petitioner remained with Century 21 until March 1987 when she moved to Wykert Realtors (T216). She worked at Wykert for nine months until the end of December 1987 (T224). She then moved to Edward H. Myers & Son, where she was employed at the time of trial (T224).

The sexual harassment and the alleged notice to Amtrak

Petitioner claims that Edward Kortright, a low-level Crew Base supervisor with no authority over her, continuously harassed her from March to August 1984, except for a brief period when Kortright was warned in mid-March to stay away from her. (T167).

Petitioner testified that after she started work at Crew Base, Kortright allegedly visited her work area on a regular basis, asked her personal questions, sat on the edge of a desk with his legs spread, and touched her arm (T62-67, T70-71).

Petitioner further claims that on March 13th Kortright misrepresented Crew Base policy to her husband and then finance Ken Hudson ("Hudson"), an Amtrak Supervisor of Structures at Penn Station, and refused to allow Hudson to enter the area so as to intimidate her (T67-73).

This March 13th incident led to a meeting on March 14th with Barry Sullivan, an Amtrak Regional Director of Passenger Services, and D. Thompson, an Amtrak Man-

ager, in which Hudson indicated he was going to the Crew Base area so often because of a problem petitioner was having with Kortright (T362). As a result of this complaint, Thompson and Luciano DePalo, General Supervisor of the Crew Base and Kortright's supervisor, immediately instructed Kortright to cease bothering and engaging in conversation with petitioner (T363-4). After this meeting, petitioner testified that for a while, during the end of March and part of April, there were no further problems (T83).

Petitioner claimed, however, at the end of April or in early May, there was an alleged incident in the copier room where Kortright came up behind her, put his arms around her and leaned into her, placing his chin on her shoulder (T79).

Petitioner also testified that throughout April and May, there were a lot of "near misses" between her and Kortright in which Kortright allegedly tried to block her way whenever she would pass him in the hallway (T83).

On July 18th, and again on August 13th, petitioner claims that Kortright blocked her path in the hallway (T86, 90-91). Thereafter, on August 20, petitioner filed her EEO complaint. On August 21st, Kortright again allegedly blocked her path (T108), and on August 27th Hudson was allegedly denied admission to the Crew Base area (T109-111). Finally, petitioner testified that Kortright continued to glare at her and try unsuccessfully to bump into her (T121). Petitioner's last day of work at Amtrak was September 12th.

Petitioner claims that she complained to Thompson and also repeatedly complained to her supervisor Frank Summa about the incidents with Kortright and that Summa would say he was going to talk to Sullivan or Thompson about Kortright (T80, 82-83).

The evidence refuting petitioner's claims and establishing that Amtrak acted reasonably.

A. *Amtrak's reasonable response and the absence of notice of any further incidents of harassment*

Amtrak's first notice of an alleged problem between Kortright and petitioner occurred as a result of the incident involving plaintiff's fiance's visits to Crew Base. In March 1984, Thompson complained that one individual was consistently disregarding the Crew Base security and insisting on entering the area unannounced several times a day (T358). Crew Base required strict security because the hearing officer responsible for disciplining employee was located there as were the confidential employees files (T357-59). Kortright, as a supervisor in Crew Base, was instructed to challenge this person who was repeatedly entering the office complex and to determine what his name was and what business he had there (T432, 437). On March 13th, Hudson attempted to enter the Crew Base area unannounced and was prevented from doing so by a clerk who requested an explanation of his business in that area (T509). Kortright was called to the scene and Hudson was told that all persons were required to check in at the Crew Base (T510).

The above incident led to the previously mentioned mid-March meeting with Hudson, Sullivan and Thompson wherein Hudson claimed that he was visiting the Crew Base to protect petitioner from the harassment of Kortright (T362). Amtrak's response was that it could not condone such actions by one employee toward another (T363) and Thompson and DePalo, Kortright's supervisor, immediately instructed Kortright to stay away from petitioner (T363-4). Amtrak was thereafter never notified of any

further problems between Kortright and petitioner until petitioner filed her EEO complaint in August (T364).

At the trial, Summa denied petitioner's claim that she repeatedly complained to him about Kortright. Summa testified that he never had any discussion at all with petitioner about her situation with Kortright (T572), and Sullivan testified that, contrary to petitioner's claims, Summa never talked with him about a problem between petitioner and Kortright (T377). Sullivan also testified that following the March meeting with Hudson, he heard nothing further about any alleged problems with Kortright until the EEO complaint was filed (T364).

DePalo similarly testified that petitioner never complained to him about Kortright (T422), and Summa also never told DePalo anything with regard to Kortright harassing petitioner (T429).

B. *Petitioner's EEO complaint, which refutes her trial testimony*

Petitioner testified that she kept a running diary from February 1984 until September 1984 listing the problems she allegedly had with Kortright (T164). Petitioner's EEO complaint filed on August 20th, however, failed to contain most of the more of dramatic incidents she testified to at trial. In her EEO complaint, petitioner lists Kortright's alleged visits to her work area between March 1st and March 14th wherein he allegedly assumed bodily positions with his legs spread. She also mentioned his allegedly discourteous behavior towards her finance (A126). However, the EEO complaint made no reference whatsoever to the alleged touching of petitioner's arm by Kortright. More importantly, following the alleged mid-March incidents, the EEO complaint contains no mention of any further incidents for the next four months (A126). Thus, missing from the EEO Complaint are the alleged hallway "near-

misses" in April and May the alleged copier room incidents in April and May in which Kortright allegedly put his arm around petitioner and leaned into her. This supports Amtrak's testimony that after Kortright was admonished by his supervisor in mid-March, there were no further reported incidents until the EEO complaint was filed.

C. *Petitioner's failure to pursue her EEO complaint against Kortright*

The evidence established that Amtrak's response to petitioner's EEO complaint was reasonable and timely.

Under Amtrak company procedure, when an EEO complaint is filed, the Personnel Office gathers the facts and makes a recommendation to the department which supervises the employee (T365). In this case, the Personnel Manager referred the complaint to Thompson, who was in charge of the Crew Base where Kortright was employed (T365). Thompson conducted a preliminary inquiry and decided that there was sufficient grounds to initiate charges and hold a hearing regarding this matter (T365). Although Kortright was a low-level supervisor, he was covered by the union agreement and therefore could not be disciplined without a formal hearing (T365-66). Further, because Kortright was a supervisor, the hearing had to be approved by Sullivan (T367). Thompson prepared the charges and Sullivan approved them (T367).

Petitioner filed her complaint on August 20th and, by October 3rd, Amtrak had accomplished all preliminary procedures and had scheduled a hearing for October 11, 1984. Petitioner did not appear on October 11th for the hearing (A130), however, and it was rescheduled for March 25, 1985 (A135). By this time petitioner was working as a real estate broker, and had sold her first house (T143, Belt at 113-14), but she again failed to appear (A137-8). The

investigation was ultimately rescheduled for September 8, 1986 and petitioner was informed that if she failed to appear on that date, Amtrak would be forced to drop the charges against Kortright (A141). Petitioner again failed to attend the hearing and the charges against Kortright were dropped (T204-05, A141).

The medical evidence

Petitioner presented the testimony of three medical witnesses on her behalf: her family physician, a psychiatrist and a psychologist. To support petitioner's unlikely claim that she suffered severe and permanent emotional injury warranting a million dollar award as a result of the alleged incidents with Kortright, petitioner's medical witnesses presented a picture of petitioner as a seriously troubled and emotionally fragile woman who was unable to cope with stress and who was susceptible to a severe emotional reaction to anything she might perceive as sexual harassment.

A. *Dr. John Howell*

Dr. John Howell was part of a group medical practice of which petitioner had been a regular patient since 1978. Dr. Howell testified that in his opinion petitioner had a prior emotional disorder and the stresses she suffered during her prior depression were significant and appeared to have contributed to the stress she perceived at her job in 1984 (Howell, 29, 126). According to Dr. Howell, petitioner had a long history of illness, including recurring intestinal spasms requiring antispasmodic drugs, a recurring ulcer requiring drugs and hospitalization, pancreatitis requiring hospitalization, and she had undergone a partial hysterectomy for cervical cancer (*Id.* at 11-12, 96-97, 98). In addition, petitioner has suffered from lymph edema and a nervous stomach since she was fifteen years old (*Id.* at 95-6), and for many years she took a thyroid replacement

hormone for a condition of hypothyroidism (*Id.* at 100, 103-4).

In 1981, petitioner was diagnosed as having exogenous depression, that is, depression caused by outside factors (*Id.* at 109). She was treated with anti-depressant medication which was not effective (*Id.* at 109), and later that year she was hospitalized for depression when she was taken off the antidepressant drugs (*Id.* at 112-3). Because petitioner was not helped by the usual array of anti-depressants, she was placed on certain rarely used drugs that rendered her susceptible to allegic reactions (*Id.* at 32-33).

Although petitioner visited Dr. Howell's group four times in March and again on August 7, 1984, she did not mention or complain about any stress at her job (*Id.* at 119-121). The first time petitioner complained about any such problem at work was on August 27th (*Id.* at 121), after she had filed her EEO complaint, and Dr. Howell thereafter diagnosed her as suffering from a panic disorder caused by the alleged sexual harassment (*Id.* at 48, 72). Dr. Howell testified that, by September 29th, petitioner had developed a near phobic fear of returning to her workplace and explained that a phobia is an unusual or irrational fear not supported by the actual problem at hand (*Id.* at 37-38).

In October 1986, Dr. Howell wrote to petitioner's counsel and stated that many of petitioner's symptoms had improved (*Id.* at 126). In February 1987, Dr. Howell again wrote that he was optimistic petitioner would be able to return to her former productive potential (*Id.* at 127).

B. *Dr. Michael Orlosky*

Dr. Michael Orlosky, a psychiatrist, saw petitioner in March 1987 and diagnosed a panic disorder (Orlosky at 10). Dr. Orlosky testified that, because of her preexisting mental condition, petitioner was susceptible to panic attacks (*Id.* at 101). He explained that "people with

agoraphobia and panic attacks usually have some sign of anxiety vulnerability preexisting" (*Id.* at 52; also see 72). Petitioner's medical history "would be consistent with an adult who later develops agoraphobia and panic attacks" (*Id.* 89). In addition, some of the medication petitioner was taking could cause generalized anxiety or recurrent panic attacks; manic symptoms such as being elated, eurphoric, irritable or agitated; restlessness, insomnia, dizziness and stomach pain (*Id.* at 62-3, 67).

C. *Barry Belt*

Barry Belt, a clinical psychologist, saw plaintiff in October of 1984, allegedly in connection with stress caused by her work situation. Belt testified that plaintiff had "a history of vulnerability, coping with stress" (Belt, 73). He stated that "[w]hen you have a condition where your coping skills are very limited, any kind of a change, like moving into a new house or even going on vacation, anything creates a considerably more stress hypothetically, even it would for people who do not have a mental condition" (*Id.* at 138).

The charge conferences

In discussing the charge conferences and the charge, petitioner attempts to give the impression that the district court was hostile towards her case and unfairly charged the jury that she was "abnormal" and "peculiar." The record shows otherwise, and establishes that the court held a full and open discussion of all charge issues; candidly expressed its views and encouraged both counsel to give their views; permitted ample opportunity for requests and exceptions; and ultimately gave a fair and balanced charge in which petitioner's trial counsel could find little that was objectionable.

During the charge conferences the court discussed with counsel what the appropriate charge should be in light of

the medical testimony which, if accepted by the jury, seemed to indicate that petitioner's was highly susceptible of panic from any approach which could be construed as sexual (A23, A27-28, A28-29, A30-31, A32-33, A34-35, A42-43). In the course of these discussions, petitioner's counsel conceded that petitioner's reaction to the sexual harassment might have been "extraordinary" (A33), but argued that under the "eggshell" principle, a negligent defendant is legally responsible for all consequences of its actions, even those that might be considered unusual or unexpected from the standpoint of the defendant (A33, A42). The court stated that it agreed with petitioner regarding the eggshell theory but questioned whether Amtrak could be found negligent at all if it was unaware of petitioner's heightened susceptibility since "in making your decision of what's reasonable and what's not reasonable, you have to know what risks are involved" (A33).

After further discussions, petitioner's counsel conceded that, with respect to petitioner's heightened susceptibility, "[t]here is no evidence in the case [Amtrak] knew about it or could have known about it or should have known about it in any way" and "[t]here is no way for Amtrak to be aware of any of this" (A44).

The court thereafter stated that it would give petitioner's eggshell theory charge. That is, if Amtrak was found negligent "then it is no defense to them to say they didn't know the result would be so serious" (A50). The court also noted that it would charge that since Amtrak was unaware of any special susceptibility on the part of petitioner, it had no duty to take special precautions. Amtrak was only subject to a reasonable man standard, *i.e.*, "the question is not whether Amtrak used the care that would have been required had they known of Mrs. Hudson's peculiar situation, the question is have they used the reasonable care which a reasonable person would have used to minimize the instances of

harassment to the extent possible, and contained the damage, if such should occur. That is your question" (A50). The court further stated that it would not charge that petitioner was "abnormal" (A60).

The mini-charge and summations

In its brief mini-charge, the court noted that, under the FELA, Amtrak was required to provide petitioner with a safe place to work and that petitioner alleged Amtrak failed to do so because it had permitted her to be subjected to sexual harassment. The court charged that the jury first had to determine whether the alleged harassment took place, and then, if it did, whether Amtrak had been negligent in failing to provide a safe work place. If the jury resolved these issues in petitioner's favor, it then had to go on to consider whether the claimed damages had been caused by Amtrak's negligence (A66-69).

Petitioner's counsel thereafter gave his summation (T635-77) in which he stressed petitioner's allegation that she was continually harassed by Kortright and that her repeated pleas to management for help were ignored. While acknowledging petitioner's prior emotional problems, he urged the jury not to be swayed by anticipated defense arguments that petitioner's present emotional state was unrelated to any alleged sexual harassment by Kortright (T639-42).

Defense counsel in his summation stressed that whether or not Kortright had committed the harassment alleged by plaintiff, Amtrak did all that was reasonably possible under the circumstances. When Amtrak became aware of a potential problem in March 1984, Kortright was immediately instructed to stay away from petitioner and no further incidents of harassment were thereafter reported until petitioner filed her EEO complaint. To the extent

petitioner had any alleged heightened susceptibility to harassment, counsel pointed out that since Amtrak was concededly unaware of it, it was not obligated to take special precautions to protect petitioner. Counsel further argued that any emotional problems presently suffered by petitioner were unrelated to the alleged harassment and were instead a continuation of her pre-existing troubles. Counsel additionally noted that petitioner's emotional problems were in any event vastly exaggerated in view of her successful real estate career after she left Amtrak (T684-727).

In his rebuttal summation, petitioner's counsel stressed the eggshell theory, arguing that while petitioner might possibly be considered to have a "greater susceptibility" to harassment which Amtrak did not know about, this was no defense for Amtrak if they were negligent (T732-33).

The court's charge

After advising the jury that Amtrak is required to use "reasonable care to provide a reasonably safe workplace for all of its employees, including this plaintiff," (A88) the court gave the jury the standard definition of negligence:

> Amtrak is responsible to see to it that it uses reasonable care, and that means the care that you think a reasonable person in the management of his own affairs would do in a situation involved (A89).

The court thereafter instructed the jury as to the standard by which it should measure Amtrak's conduct. As it had indicated at the conclusion of the charge conferences, the court did *not* advise the jury that petitioner had any heightened susceptibility. It stated that this issue was for the jury to resolve and that in any event, such alleged susceptibility was not to be considered in measuring Amtrak's duty of care. Amtrak was required to exercise reasonable care to protect the ordinary person at the workplace (A90-91).

The court then gave the charge requested by petitioner's counsel on the eggshell theory, specifically adopting the argument petitioner's counsel had made in summation:

> But on the other hand, as Mr. Sable told you, if it turns out that you conclude, A, that these things happened, and B, that Amtrak's failure to use the care necessary to prevent this king of injury to a normal person, that makes them negligent, if you find that. Then they can't be heard to say we didn't know it would be so bad. If they were negligent, the care they took was not sufficient in your judgment to give proper protection to a perfectly normal person, then they are responsible. Then their negligence caused this event and they can't be heard to say, oh, we didn't know it would be so bad. Do you follow the difference? (A91-92).
>
> * * *
>
> [I]t is like I think Mr. Sable told you about the eggshell theory, and that's a pretty good theory. I adopt what he said about the eggshell. So if the preexisting conditions merely made her more susceptible to injury by what is normally sexual harassment, then the preexisting injuries are no defense (A95).

After the court concluded its main charge, there was another conference in the robing room. Other than one exception on the question of work-life expectancy for purposes of damages computation, petitioner's counsel had no exceptions to the charge (A101-02, A108).

The jury's verdict and the Second Circuit's decision

At the conclusion of the trial the jury found that, while petitioner had been harassed by Kortright, Amtrak had not

been negligent in its response to the harassment. The court thus entered judgment in favor of Amtrak (A116, A119, T792-93).

On appeal to the Second Circuit, petitioner asserted that a new trial was required on the basis of various alleged unpreserved charge errors, many of which she again raises before this Court. In a summary order of affirmance, the Second Circuit rejected petitioner's claims, writing:

> "The charge given by the district court was a fair statement of FELA law as it should apply to the circumstances of this case. The court's references to plaintiff's possible over susceptibility to injury from conduct of the type complained of were appropriate in light of the evidence and arguments of counsel. Plaintiff received a fair trial."

ARGUMENT

I

Certiorari should be denied since petitioner's failure to object to the charge or to raise her claims below precludes her from raising them on appeal.

The law is well stated that "an error in a jury charge will not be considered on appeal unless a timely objection was made at trial, stating the nature of, and the ground for, the objections." *Air Et Chaleur, S.A. v. Janeway,* 757 F.2d 489, 492 (2d Cir. 1985). "The purpose of requiring a timely objection is to identify the disputed issue and give the trial judge a chance to correct error which might otherwise necessitate a new trial." *Robertson v. Shapiro,* 646 F.2d 734, 742 (2d Cir. 1981).

"When no objection has been made to a jury charge reversal will only be warranted where the instructions given

amount to plain error." *Almonte v. National Union Fire Ins. Co.*, 787 F.2d 763, 767 (1st Cir. 1986). The plain error exception, however, "must be applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice". *Id.* at 769.

Pursuant to these well settled principles of law, petitioner is precluded from raising each and every issue she asserts on appeal since not one of these points was adequately raised during the trial.

Petitioner's primary contention on appeal is that she was denied a fair trial because of the court's hostile and biased charge which unfairly portrayed her as a weak and abnormal person because she was unable to stand up to Kortright's harassment. Despite this argument, plaintiff's experienced counsel voiced not a single objection to that effect below and, indeed, never once during the trial suggested the court was treating petitioner's claim other than completely fairly. This is because petitioner's bias argument is nothing more than creative appellate advocacy. It is completely without substance and not worthy of this Court's consideration.

The same is true with respect to petitioner's arguments that the court erred in defining negligence and the measure of duty owed to petitioner by Amtrak. Petitioner's counsel never once took issue with the court's change on these issues. This was so even though petitioner's counsel heard the court's charge on numerous occasions at the conferences and again when the actual charge was delivered. Indeed, petitioner's counsel specifically *objected* to the Court's giving any further charge on negligence, as was suggested by defense counsel. These claims too were therefore waived. Finally, petitioner's counsel also never took exception to the court's causation charge.

In short, petitioner's appeal presents nothing that has been preserved for review by this Court and her claims therefore should be summarily rejected. While this Court could review the issues under the plain error rule so as to prevent a miscarriage of justice, the plain error rule has no application to this case. Not only was there no reversible error in the charge (see below), let alone the kind of egregious error needed to invoke the plain error rule, but the jury's verdict is anything but a miscarriage of justice. The verdict simply represents the jury's rational decision not to accept petitioner's claims in light of their improbability and in the face of defendant's highly persuasive opposing proof.

II

Certiorari should be denied since this case presents no significant legal issues. In addition, petitioner's charge issues are completely without merit. The Court's charge fairly presented the law as it applies to this case.

There is no reason for this Court to grant certiorari to review this case. It is a negligence case presenting disputed factual issues that were resolved by the jury. There are no issues of public importance presented, and, contrary to petitioner's claim, this is not even a sexual harassment case. Petitioner does not allege she was denied a promotion or otherwise sexually harassed or discriminated against by Amtrak. She merely claims that Amtrak was negligent in allegedly failing to protect her from a fellow employee. And, her various claims of error merely challenge the discretionary decisions made by the district court in conducting the trial. Review of those rulings is not likely to generate issues of law of national importance so as to warrant this Court's attention. Finally, and perhaps most importantly, all of the points raised by petitioner are completely without merit.

The charge was fair and correct

"It is by now axiomatic that a Court's charge must be tested by viewing it as a whole." *Fernandez v. Fitzgerald,* 711 F.2d 485, 487 (2d Cir. 1983). An appellate court "must decide whether the entire charge, viewed in light of all of the evidence, would tend to confuse or mislead the jury as to the principles of law that apply to the facts." *National Railroad Passenger Corporation v. 25,900 Sq. Ft. Parcel of Land,* 766 F.2d 685, 688 (2d Cir. 1985). The court's charge here, taken as a whole and considered in relation to the evidence that was before the jury, fairly presented the law as it applies to this case.

When charging the jury, "the trial judge is given wide discretion as to the style and wording that he may employ." *Andres v. Roswell-Windsor Village Apts.,* 777 F.2d 670, 673 (11th Cir. 1985), and "the fact that the instructions are technically imperfect or are not a model of clarity does not render the charge erroneous". *Robinson v. Monsanto Co.,* 758 F.2d 331, 335 (8th Cir. 1985). *Miller v. Rykoff-Sexton, Inc.,* 845 F.2d 209, 212 (9th Cir. 1988).

Put another way, "no particular form of words is essential if the instruction as a whole conveys the correct statement of the applicable law." *Furr v. AT&T Technologies, Inc.* 824 F.2d 1537, 1549 (10th Cir. 1987).

In the instant case, the court properly incorporated all of the relevant legal elements into its charge and presented them to the jury is straightforward laymen's terms, thereby making it far more likely the jury would be in a position to understand and properly apply the applicable rules of law. Furthermore, as explained below and as found by the Second Circuit, the court's charge was balanced and fair in every respect.

The alleged emphasis on petitioner being abnormal

Contrary to petitioner's claim, nothing in the court's charge could reasonably be construed as giving the jury the impression the court was biased against petitioner or believed she was peculiar. The court carefully refrained from voicing any opinion on the case in the presence of the jury and repeatedly instructed the jury during the course of the trial and the charge that the court had no opinion on any factual matter because the court's opinion on the facts was of no value whatsoever. It was for the jury alone to resolve the facts (T626-30, T537, T677, T756, T761).

The court's statement to the jury that it had "heard a lot of discussion pro and con, both ways, about whether the plaintiff was different than normal people" (A90-91) was accurate in view of the medical testimony and was precisely the point that petitioner's counsel himself had acknowledged in the rebuttal summation (T732-33). Furthermore, far from expressing any opinion on petitioner's condition, the court left it to the jury to consider whether petitioner had an "inordinate susceptibility" and instructed them that, in any event, since Amtrak was concedely unaware of it, this was not a factor for the jury to consider in determining whether Amtrak acted reasonably.

The only references made by the court to any susceptibility on the part of petitioner was in its "eggshell" theory charge which the court gave pursuant to petitioner's counsel's request. In this charge the court paraphrased and specifically adopted petitioner's counsel's own language used in his summation (compare A91-92, A95 with T732-33), prompting defense counsel to raise an objection (A102-03). Petitioner has absolutely no cause to complain about this charge and, indeed, this is precisely why her counsel raised no objection at trial.

Amtrak's duty of care owed to petitioner

Although petitioner's counsel conceded at trial that Amtrak had no awareness of any heightened susceptibility on petitioner's part, petitioner now asserts that the court erred in charging that Amtrak was only obligated to exercise reasonable care so as to protect the ordinary person at the work place. Petitioner asserts that the concept of negligence "includes the obligation to regulate one's conduct with a view to a range of other people's disabilities and frailties" (Petition at 35).

Petitioner's argument flies in the face of basic principles of negligence law. In the legendary New York case of *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928), and New York law is concededly applicable here, Judge Cardozo made the classic observation that "[t]he risk reasonably to be perceived defines the duty to be obeyed." The courts have long since uniformly held that a defendant only has a duty to guard against risks that are foreseeable, and "[f]oreseeability means that which it is objectively reasonable to expect, not merely, what might conceivably occur." *Peck v. Ford Motor Co.*, 603 F.2d 1240, 1246-47 (7th Cir. 1979). *Accord Levine v. City of New York*, 309 N.Y. 88, 92-93 (1955); *Dacchille v. New York World Tel. Corp.*, 20 A.D.2d 892, 248 N.Y.S.2d 1021 (2d Dep't 1964), *aff'd*, 15 N.Y.2d 923, 258 N.Y.S.2d 845 (1965); Prosser & Keeton, *The Law of Torts* § 31, at 170 (5th ed. 1984) (negligence is unreasonable risk, and risk "necessarily involves a recognizable danger, based upon some knowledge of the existing facts . . ."); 3 Harper, James & Gray, *The Law of Torts* § 16.9 (2d ed. 1986).

Since petitioner's counsel stipulated at trial that Amtrak had no knowledge, nor any reason to know, of petitioner's alleged frailties, it is simply absurd for petitioner to suggest

that the court should have charged Amtrak with a duty to take extraordinary precautions to protect petitioner. Reasonable care under the circumstances was all that was required.

The court also charged the jury that "reasonable care . . . means the care that you think a reasonable person in the management of his own affairs would do in a situation involved" (A89) and that the "[negligence] of Amtrak is if . . . [it] fails to take such steps as you find a reasonable person in their position would take, in the management of their own affairs . . ." (A108). Notwithstanding the assertions in petitioner's brief, this charge is not materially different from the negligence charges requested by both petitioner and defendant or from the pattern jury charge. *See* 3 Devitt, Blackmar & Wolff, *Federal Jury and Practice Instruction, Civil* § 94.02 (4th Ed 1987). This charge was proper.

Causation

While petitioner critizes the court's charge on causation, the point is academic since the jury returned a verdict finding that Amtrak was not guilty of negligence and therefore never reached the next issue of whether petitioner's alleged injuries had been caused by Amtrak's negligence.

Furthermore, the court properly charged the jury on causation, giving the precise eggshell theory requested by petitioner and otherwise carefully explaining to the jury how it should resolve the causation issues. While the court declined to give a strict *Rogers v. Missouri Pacific R. Co.*, 325 U.S.500 (1957) charge, this was proper under the circumstances since that case, which governs the usual FELA work-site accident, is not neatly translatable to the different type of FELA claim asserted by petitioner in this

case. The law, moreover, does not require that the court use any "exact language" in its charge. *Denniston v. Burlington Northern, Inc.*, 726 F.2d 391, 393 (8th Cir. 1984). All that is required is that the court give a fair statement of the correct legal issues, which the court did.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York
July 28, 1989

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.: 88-1985

IN THE
Supreme Court of the United States
October Term, 1988

MARGARET HUDSON,

Petitioner,

-against-

NATIONAL RAILROAD
PASSENGER CORPORATION,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
1. REVIEWABILITY	1
2. AMTRAK'S LEGAL ARGUMENTS . . .	4
3. THE ATTACK ON PETITIONER . . .	6
4. AMTRAK'S "REASONABLE RESPONSES	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

Atchison, Topeka & Santa Fe R. Co. v. Buell, 480 U.S. 557 (1987) 4, 5

Biundo v. Old Equity Life Ins. Co., 662 F.2d 1297 (9th Cir. 1981) 2

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 2

Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957) . . . 2, 5

Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253 (2d Cir. 1956) . . . 2, 3

United States v. Clark, 475 f.2d 240 (2d Cir. 1973) 3

Other Authorities:

American Psychiatric Associations "Statement on Discrimination Based on Gender or Sexual Orientation," Am. J. of Psychiatry, November 1981, p. 1494 11

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1. REVIEWABILITY

The short answer to Amtrak's argument that petitioner did not sufficiently preserve for review the issues presented by her petition (Br., 19-21) is that, not only were these issues preserved, but they were reviewed on the merits by the Court of Appeals and this Court has at least the same power and authority to review

these issues as did that court. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 256 (1981). In addition, in making this argument, which even Amtrak concedes does not constitute any absolute bar to review (Br., 21), Amtrak ignores the record made by trial counsel in attempting to obtain a proper charge in this case (see, e.g., JA 55-56 [counsel granted an "exception" on issue of alleged "supersusceptibility" to injury by reason of sexual harassment]; JA 36-37 [express refusal of Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957), instruction on causation]; JA 58-59 [no need to repeat previously denied requests]). Compare Biundo v. Old Equity Life Ins. Co., 662 F.2d 1297, 1300 (9th Cir. 1981) (following "functional approach" to Rule 51); cf. Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253 (2d Cir.

1956) (reviewing both excepted to and unexcepted to errors). Likewise, Amtrak ignores that in fact the court's charge was overwhelmingly extemporaneous, with the court radically departing from what it had earlier informed counsel it would be charging this jury. See Petition, 20-22. Compare Troupe, 234 F.2d at 260-61 (Frank, J., concurring) (noting difficulty faced by counsel who does not have written copy of charge); see also United States v. Clark, 475 F.2d 240, 250-51 (2d Cir. 1973) (criticizing extemporaneous charge).

Should there by any doubt as to the reasonableness of counsel's repeated efforts to secure a proper charge in this case or as to how petitioner was grievously prejudiced by the charge given, it is respectfully submitted that such doubt can be resolved by examination of the record of the charge

conferences (JA 16-65) and the instructions which were given (JA 66-69, 71-72, 74-101, 106-08, 110-15). That record fully demonstrates the court's uninformed hostility toward petitioner's claim, how counsel repeatedly sought to point out that there was no evidence that petitioner was peculiar by reason of her having been injured by Kortright's sexual harassment, and ultimately how unfair and prejudicial was the charge given.

2. AMTRAK'S LEGAL ARGUMENTS

Amtrak's negligence argument (Br., 24-25) is patently superficial. Compare Atchison, Topeka & Santa Fe R. Co. v. Buell, 480 U.S. 557, 568 (1987) (FELA liability can turn on "subtle and intricate distinctions"); see also Petition, 34-41). Further, its claim that this issue is controlled by New York law (Br., 24), is incorrect, see, e.g.,

Rogers, 352 U.S. at 507, n. 13, as is also its argument that the Rogers causation instruction should not apply to a Buell-type case, see Buell, 480 U.S. at 562, n. 8 (citing Rogers on issue of causation); see also Rogers, at 507 n. 14 (citing and quoting 45 U.S.C. §51).

In addition, Amtrak's attempt to portray petitioner as emotionally unstable (see infra), which is in fact both baseless and vicious, ignores that, even were this the case, she would still have been entitled to a workplace that was safe and to be protected against sexual harassment. See Petition, 35-36, 39-41. All this argument demonstrates is how necessary it is in such cases for trial courts to distinguish carefully between negligence and the fact that a particular victim may have suffered unusually

severe consequences as a result of the actor's negligence, which this charge plainly did not do.

3. THE ATTACK ON PETITIONER[1]

Amtrak states that the medical evidence "presented a picture of petitioner as a seriously troubled and emotionally fragile woman who was unable to cope with stress and who was susceptible to a severe emotional reaction to anything she might perceive as sexual harassment" (Br., 12). In support of this assertion, it cites Dr. Howell's testimony concerning prior instances of stress and depression

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[1]Although Amtrak's personal attack on petitioner is in fact irrelevant to the issues of whether Amtrak was negligent and whether petitioner's condition was contributed to by that negligence, because Amtrak has focused on petitioner's prior mental and emotional condition as its first line of defense in opposing this petition, we believe that it is necessary that we address these contentions in some detail.

which "were significant and appeared to have contributed to the stress she perceived at her job in 1984" (Br., 12, citing Howell, 29, 126).

It also cites Howell's testimony concerning a 1981 episode of depression experienced by petitioner (Br., 13, citing to Howell, 109, 112-13, 32-33), as well as Dr. Orlosky's testimony concerning possible preexisting susceptibility to panic attacks (Orlosky, 101), which Amtrak describes as a "preexisting mental condition" (Br., 13), and that of psychologist Belt, which, by selective quotation, Amtrak portrays as establishing "a history of vulnerability, coping with stress" (id., 14, citing to Belt, 73), and "limited...coping skills," and, again, even "a mental condition" (Br., 14, quoting from Belt at 138).

In fact Dr. Howell pointed out that petitioner had endured other

quite stressful situations which had not caused panic attacks (Howell, 55-57, 74-77). These included divorce, medical illnesses and the death of her father in 1981, after which she did suffer a period of depression for which she was treated in 1981, and in connection with which she did have an adverse reaction requiring hospitalization when she was taken off an antidepressant. (id., 29, 55, 57-58, 112-13).

However, Howell did not testify that the prior stress or depression in any way caused the injury she suffered as a result of the prolonged workplace sexual harassment to which she was subjected, which, in any event, would not establish that she was previously "a seriously troubled and emotionally fragile woman...unable to cope with stress [or] susceptible to a severe emotional reaction to anything she might perceive as sexual harass-

ment" (Br., 12). And, as to Howell's statement that the earlier "significant stresses in [petitioner's] life... seemed to be contributing to the stress that she perceived in 1984" (Howell, 29), as he explained, such prior stresses affect how the patient "perceives" new stress (id., 29-30). In his testimony at that point the doctor was referring to the patient's "perception," not to causation or predisposition.

Similarly misleading is Amtrak's reference to Dr. Orlosky's testimony that "some of the medication petitioner was taking could cause generalized anxiety or recurrent panic attacks" (Br., 14, citing Orlosky, 62-63, 67). In fact, at pages 62-63 Orlosky was testifying about medication petitioner was taking for her present condition when he saw her in July, 1987 (Orlosky, 59-64). And, as to page 67,

there all the doctor indicated was that petitioner had in the past suffered from hyperthyroidism and that excessive doses of medication for that condition--of which there was absolutely no evidence--could produce panic attacks or generalized anxiety (Orlosky, 66-67).

Likewise dishonest is Amtrak's attempt to suggest through Belt's testimony that petitioner had had a prior history of extreme vulnerability and inability to cope with stress and even a prior "mental condition" (Br., 14, citing to Belt, 73 and 138). In fact, while Belt did testify that petitioner had a history of "some stresses [centering] around physical problems" (Belt, 28), which would have a tendency to make one more vulnerable to panic attacks (id.), he was firm that she had not had "emotional problems" (see Belt, 28). And, as to

his reference (at page 138) to "coping skills [being] very limited" and even to "a mental condition" (see Br., 14), it is sufficient to note that in this part of his testimony Belt was referring to petitioner's condition when he was treating her in February, 1985, which was months after she had left Amtrak (see Belt, 137-38). More pertinent to this issue is Belt's testimony describing how, starting in June, 1984, he began treating petitioner for the stress she was suffering as a result of Kortright's harassment (Belt, 6, 8-9, 11), which harassment caused her to be "very upset," with physical symptoms (id., 9), and with petitioner becoming "increasingly focused and preoccupied with this stressor" (id., 10). Compare American Psychiatric Association, "Statement on Discrimination Based on Gender or Sexual Orientation," Am. J.

of Psychiatry, November 1988, p. 1494, identifying sexual harassment as a potentially severe occupational stressor.

The Claim of Malingering

At page 13 of its brief Amtrak notes that, "[a]lthough petitioner visited Dr. Howell's group four times in March and again on August 7, 1984, she did not mention or complain about any stress at her job [citing Howell, 119-21]. The first time petitioner complained about any such problem at work was on August 27th id. at 121), after she had filed her EEO [sic] complaint." Similarly, Amtrak has petitioner seeing Belt, presumably for the first time, "in October of 1984" (Br., 14). Also, Amtrak makes much of petitioner's pursuing a career in real estate after she left Amtrak (Br., 6-7).

However, Amtrak ignores Belt's testimony that he began treating petitioner for stress in June, 1984 (Belt, 6, 8-9, 11). It also ignores the testimony of petitioner's medical witnesses establishing that she was suffering from a seriously disabling illness and that the precipitating cause of this was the sexual harassment to which she had been subjected at her place of work (see Howell, 56; Orlosky, 26-27; Belt, 26-27, 85, 98-99, 119-20). Also, Amtrak ignores for how long petitioner attempted to continue working despite Kortright's persistent harassment and Amtrak's indifference to her plight. In addition, it ignores that petitioner's subsequent real estate employment was employment which Belt believed would be consistent with her need to avoid confinement and to come and go as she felt necessary (Belt, 20-21). Again, Amtrak's

appellate strategy is both obvious and, we believe, dishonest. There is no basis for Amtrak's suggestion that petitioner is a malingerer, and it is dishonorable for Amtrak to make this type of attack on her.

Ability to Hold a Job

Likewise dishonest is Amtrak's attempt to portray petitioner as incapable of holding a job for more than a very short period (Br., 5-6). There was nothing extraordinary about petitioner's early in her work career having changed jobs in order to better herself (see T35-36, left first two jobs for more money). Nor was it evidence of instability that in 1975 she had to leave her then job to be hospitalized for cancer surgery, following which, after four weeks, she returned to that same job (T36-37), or that later in 1975 she joined Amtrak in order to obtain medical coverage, as

well as better pay, or that in May, 1976, she accepted a promotion which required her to move to the Philadelphia area, where she continued to work for Amtrak until August, 1980, over four years later, when she resigned because her then marriage was failing and her father was dying of cancer (T38-39, 41-43).

Moreover, it is significant that during her last period of Amtrak employment, which was from August, 1983 through September, 1984, during which she worked arduous hours while at the same time trying to raise a young son, she was promoted to a higher position, requiring her transfer to New York from Amtrak's Philadelphia offices (T50-53). And the voluntary "demotion" which Amtrak refers to (Br., 6) was, she explained, occasioned by the fact that she was commuting to New York from

Trenton and she was desirous of working more reasonable hours in order to have time with her son (T54-55).

In short, Amtrak's personal attack on petitioner is nothing more than an unwarranted cheap-shot which only brings dishonor on Amtrak and disserves this Court and the cause of justice.

4. AMTRAK'S "REASONABLE RESPONSES"

Amtrak asserts, citing to Mr. Sullivan's testimony concerning what instructions he had given Thompson and DePalo, that they "immediately instructed Kortright to stay away from petitioner" (Br., 9; see also id., 8). This is an outright misrepresentation of the evidence. Sullivan testified that he did not follow up on this matter (T 364). Thompson did not testify. And neither Kortright nor DePalo testified to Kortright's being

emphatically instructed to cease and desist bothering petitioner (see T512 [Kortright]; T 418-30 [DePalo]).

In this same vein, Amtrak ignores Thompson's failure to inform Sullivan of the sexual harassment complaint made against Kortright in February, 1984 (see T397, 401-02, 302-04). Also, Amtrak never explains why this jury, which accepted petitioner's testimony concerning Kortright's harassing her, was required to reject her testimony concerning her complaints to Summa.

Finally, although Amtrak claims to have acted "reasonably" in response to petitioner's "formal" complaint in August, 1984, it makes absolutely no attempt to defend its delay in responding to that complaint. And, in fact, there is no evidence of Amtrak's taking any steps to protect petitioner against Kortright's

continued harassment following the filing of her August complaint until by letter dated October 3, 1984, it notified Kortright that he was to "attend a formal investigation" (JA 128-29; T548). This did not comport with Amtrak's requirement of a "prompt and thorough investigation" (JA 121) or its requirements that supervisors and managers "maintain[] a positive and productive work environment" and that supervisors "take all steps possible to eliminate any harassment they become aware of" and "counsel subordinates as necessary" (id.).

CONCLUSION

Amtrak's strategy in opposing this petition is both transparent and dishonorable. It is willing to misstate the law and to misrepresent the facts. It has adopted this strategy because it has no legitimate basis for opposing this petition.

Based upon the errors which occurred at this trial, this Court should grant the writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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August 5, 1989